IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANDREW J. ARCHULETA, Appellant.	)	DIVISION ONE No. 66610-0-I UNPUBLISHED OPINION FILED: July 16, 2012

Dwyer, J. — Andrew Archuleta was convicted of attempted murder in the first degree, assault in the first degree, and unlawful possession of a firearm in the second degree based upon an incident in which he shot and injured two teenagers. Archuleta, who was 15 years old at the time of the incident, asserts that the juvenile court abused its discretion by determining that he should be tried as an adult. The record, however, indicates that the juvenile court properly considered each of the eight Kent[1] factors in making this determination and that substantial evidence supports the court's findings with respect to each factor. Accordingly, we determine that the trial court did not abuse its discretion by finding that declination would be in the best interest of the public. Because

[1] Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).

Archuleta's remaining contentions similarly lack merit, we affirm his convictions.

I

On July 6, 2009, brothers Isaac and David Garnica were skateboarding in the street outside their apartment complex in Auburn. Several other young people from the neighborhood were also playing in the area. At approximately 9:00 p.m., a silver minivan drove past Isaac and David and parked beside a nearby apartment building. Although Isaac was unable to discern the identities of the minivan's occupants, the vehicle was typically operated by members of the Rancho San Pedro 3rd Street Pee-Wee Surenos ("RSP") gang.[2]

Shortly thereafter, an individual walked up the street toward Isaac. A white shirt partially covered the individual's head and face. Dustin Moore, a neighborhood teenager, recognized the individual as Andrew Archuleta, Moore's classmate at school. Moore made eye contact with Archuleta as they passed one another.

Archuleta approached Isaac, pointed a 9mm handgun at him, and fired the weapon multiple times. Isaac sustained five gunshot wounds to his upper and lower right lung, his diaphragm, his neck and jaw, and his upper right arm. The bullets severed Isaac's jugular vein and lacerated his liver and kidney.[3] When David attempted to intervene, Archuleta pointed the gun at David's head.

[2] Archuleta was a "lieutenant" in the RSP gang, which was founded in Auburn by Archuleta's father. Members of the RSP gang believed that Isaac, who had been a member of a rival gang, was responsible for shooting Archuleta in September 2008. RSP members had attempted to shoot Isaac on at least one prior occasion following that incident.

[3] Issac's kidney was later removed. Isaac also sustained injuries to his spinal cord from bullet fragments.

Archuleta fired the weapon again, and David's right hand was struck by a bullet as he raised it to defend himself. Archuleta then ran away toward a nearby park.

Archuleta, who was 15 years old at the time of the incident, was charged in juvenile court with attempted murder in the first degree with a firearm enhancement (count I), assault in the first degree with a firearm enhancement (count II), and unlawful possession of a firearm in the second degree (count III). A decline hearing was held in the juvenile court in January 2010.[4] Both Isaac and David testified at the hearing. Although the brothers had identified Archuleta as the perpetrator in their statements to police, they now claimed that Archuleta was not the shooter.[5] The juvenile court determined that declining jurisdiction was in the best interest of the public and ordered that the case be transferred to adult court.

Prior to Archuleta's trial, the charges against him were amended to add a count of intimidating a witness (count IV) and to add a gang aggravator to the charge of attempted murder in the first degree. At the conclusion of the trial, the jury found Archuleta guilty as charged on counts I, II, and III. The jury also returned special verdicts finding that Archuleta was armed with a firearm during the attempted murder and the assault and that the attempted murder was committed with the intent to benefit a criminal street gang. Archuleta was

[4] A decline hearing was mandatory due to the nature of the charges and Archuleta's age at the time of the alleged commission of the offenses. Former RCW 13.40.110(1)(a) (1997).

[5] The Garnica brothers later admitted that they learned about the decline hearing from Archuleta's sister and that they received a ride to the decline hearing from Archuleta's family. Isaac testified at the trial that being "labeled a snitch" by gang members is a "bad thing."

acquitted of the charge of intimidating a witness. The trial court imposed a sentence within the standard range.

Archuleta appeals.

II

Archuleta first contends that the juvenile court erred by declining jurisdiction because, he asserts, the court based its decision solely upon the seriousness of the crimes with which Archuleta was charged. However, the record demonstrates that the juvenile court considered each of the eight Kent factors and that substantial evidence supports the court's findings with respect to each factor. Accordingly, we disagree.

A juvenile court's decision to decline jurisdiction is discretionary and is subject to reversal only if manifestly unreasonable or based upon clearly untenable grounds. State v. M.A., 106 Wn. App. 493, 498, 23 P.3d 508 (2001). The court's factual findings will not be reversed if they are supported by substantial evidence. M.A., 106 Wn. App. at 498. Substantial evidence exists where there is sufficient evidence to persuade a fair-minded, rational person of the truth of the premise. State v. Ware, 111 Wn. App. 738, 742, 46 P.3d 280 (2002).

After holding a decline hearing, the juvenile court may "order the case transferred for adult criminal prosecution upon a finding that the declination would be in the best interest of the juvenile or the public." RCW 13.40.110(3).

The State has the burden of proving by a preponderance of the evidence that declining jurisdiction is in the best interest of the juvenile or the public. State v. Toomey, 38 Wn. App. 831, 834, 690 P.2d 1175 (1984). In determining whether to decline jurisdiction, the juvenile court must consider eight factors, originally enumerated by the United States Supreme Court in Kent v. United States, 383 U.S. 541, 566-67, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).[6] The Kent factors are:

> (1) the seriousness of the alleged offense and whether the protection of the community requires waiver; (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (3) whether the alleged offense was against persons or against property; (4) the prosecutive merit of the complaint; (5) the desirability of trial and disposition of the entire offense in one court when the juvenile's accomplices in the alleged offense are adults; (6) the juvenile's sophistication and maturity as determined by consideration of his or her home, environmental situation, emotional attitude, and pattern of living; (7) the juvenile's record and previous history; and (8) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by the use of procedures, services, and facilities available in the juvenile court.

M.A., 106 Wn. App. at 497-98.

Not all eight of the Kent factors must be proved in order to justify declination; however, the juvenile court's failure to give appropriate consideration to the Kent factors constitutes an abuse of discretion. M.A., 106 Wn. App. at 498. "This court examines the entire record, including the court's oral opinion, to determine the sufficiency of the court's reasons for declination."

[6] Our Supreme Court has adopted the Kent factors to govern decline hearings in Washington. See State v. Williams, 75 Wn.2d 604, 606-07, 453 P.2d 418 (1969); see also State v. Massey, 60 Wn. App. 131, 136-37, 803 P.2d 340 (1990).

State v. H.O., 119 Wn. App. 549, 556, 81 P.3d 883 (2003).

Archuleta asserts that the juvenile court erred by concluding that the State had proved that transfer to adult court would be in the best interest of Archuleta or the public. He contends that the court "never moved beyond the charges against [him] in its analysis." The record, however, establishes that the juvenile court gave appropriate consideration to each of the Kent factors. Moreover, the record amply supports the juvenile court's findings.

As an initial matter, Archuleta stipulated to the first, second, and third Kent factors. Archuleta conceded (1) that "the offense was extremely serious and warrants community protection," (2) that "the alleged offense suggests the offense [was] committed in an aggressive, violent, and premeditated manner," and (3) that the alleged offense was "committed against a person" and not against property. Archuleta cannot now contend that the juvenile court erred by determining that each of these factors weighed in favor of declining jurisdiction.[7]

Moreover, the juvenile court properly determined—pursuant to the court's consideration of the eighth Kent factor—that the juvenile system would not provide adequate protection for the public. If retained in the juvenile system, Archuleta faced a standard range of only 103 to 129 weeks in juvenile rehabilitation for attempted murder in the first degree and assault in the first

[7] Archuleta contends that, because the Legislature has not mandated the adult prosecution of all juveniles charged with attempted murder in the first degree and assault in the first degree, "there must be something unique to Andrew and his crimes that justifies" transfer to adult court. However, having stipulated that his alleged offenses were extremely serious and committed in an aggressive, violent, and premeditated fashion, Archuleta cannot viably assert that the nature of his crimes did not weigh in favor of declination.

degree. Although the juvenile court recognized the possibility of rehabilitation within the juvenile system, the court determined that the nature of Archuleta's offenses was too severe "for [the court] to view this as being something that could be effectively dealt with in the juvenile system, just from a public safety point of view." The court did not err by determining that this factor weighed in favor of declination.

The record further demonstrates that the juvenile court also considered the other relevant factors.[8] In considering the sixth Kent factor, the court determined that Archuleta "manifests a sophistication and maturity requiring that . . . jurisdiction be declined." Substantial evidence supports this finding. At the time of the decline hearing, Archuleta was living without adult supervision. A forensic psychological report before the court indicated that Archuleta's "lifestyle suggests a level of 'street smarts.'" Moreover, the juvenile court had the opportunity to observe Archuleta's demeanor throughout the decline hearing. Based upon these first-hand observations, the court noted that Archuleta seemed "pretty sharp, pretty mature." Although other evidence adduced at the hearing suggested that Archuletta possessed "uneven levels of maturity," sufficient evidence existed to support the trial court's determination that the sixth Kent factor also weighed against retaining jurisdiction.

As to the seventh Kent factor, the juvenile court noted that Archuleta's

[8] The fifth Kent factor—the desirability of disposition of the offense in one court if the juvenile's accomplices are adults—was inapplicable under the facts of the case and thus was not considered by the juvenile court.

prior contacts with law enforcement were minimal and that Archuleta had "managed to distance [himself] from the people that were . . . getting into difficulty." The court also acknowledged that—under the fourth Kent factor—the merit of the complaint was "put into question" by the recanting of Isaac and David Garnica. Both of these factors favored retention of jurisdiction by the juvenile court.

Nevertheless, not all eight of the Kent factors must be proved in order to justify declination. M.A., 106 Wn. App. at 498. The record reflects that the juvenile court considered all of the relevant Kent factors as required, M.A., 106 Wn. App. at 498, and that substantial evidence supports the court's findings. Ware, 111 Wn. App. 742. Because the juvenile court's decision was not based upon manifestly unreasonable grounds,[9] M.A., 106 Wn. App. at 498, the court did not abuse its discretion by determining that the State had proved that declining jurisdiction was in the best interest of the public.[1] Archuleta's assertion

[9] Archuleta assigns great significance to the juvenile court's statement that it did not "want to be responsible in four or five years for someone who bides his time and gets out . . . and decides to shoot somebody. You know, my name will be attached to that." Although it is true that a judge's desire to avoid negative publicity is not a proper basis to decline jurisdiction, there is no indication in the record that this consideration played any role in the court's final decision. Indeed, just prior to making this statement, the court explained that it had not yet made a decision and was still weighing the relevant factors. ("I'm not going to tell you what my decision is because I haven't made it yet."). "Not all words uttered by judges in courtrooms constitute rulings." State v. Hunter, 147 Wn. App. 177, 187, 195 P.3d 556 (2008), reversed on other grounds, State v. R.P.H., 173 Wn.2d 199, 265 P.3d 890 (2011). Here, the record clearly demonstrates that the juvenile court's decision to decline jurisdiction was guided by the Kent factors. The court's comment does not reflect an abuse of discretion.

[1] Archuleta further contends that the declination procedure violated his constitutional rights to due process and a jury trial because the juvenile court found the facts necessary to decline jurisdiction by a preponderance of the evidence. Such facts, he asserts, are facts essential to punishment that must be found by a jury beyond a reasonable doubt. We have recently addressed this precise issue, ruling to the contrary. State v. Childress, No. 66577-4-I (Wash. Ct. App. July 16, 2012).

to the contrary is unavailing.

III

Archuleta next contends that the prosecutor committed flagrant and ill-intentioned misconduct by disparaging the role of defense counsel during rebuttal argument. We disagree.

"A defendant claiming prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial." State v. Miles, 139 Wn. App. 879, 885, 162 P.3d 1169 (2007). Improper comments are prejudicial only where "'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (alteration in original) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). Moreover, "'[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.'" State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994) (quoting Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)). Accordingly, where a defendant does not object and request a curative instruction at trial, reversal is unwarranted unless the objectionable remark "'is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State

v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

Here, Archuleta asserts that the prosecutor committed misconduct requiring reversal during rebuttal argument. After noting that the defense had made contradictory arguments by suggesting that Archuleta's older brother was both an alibi witness and an alternative suspect in the shooting, the prosecutor described this tactic as "smoke and mirrors" and stated that "[t]hat is the job of a defense attorney." The prosecutor then told the jury that her own "job is different," and that a prosecutor's job is to present all of the relevant evidence, whether that evidence is helpful to the State or not. Archuleta did not object to the prosecutor's remarks.

Archuleta is correct that a prosecutor should not make arguments that disparage or impugn the role of defense counsel. State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011); State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008). Similarly, it is improper for a prosecutor to "'draw the cloak of righteousness around the prosecutor in his personal status as government attorney.'" State v. Gonzales, 111 Wn. App. 276, 283, 45 P.3d 205 (2002) (quoting United States v. Frascone, 747 F.2d 953, 957-58 (5th Cir.1984)). Indeed, the State concedes that the prosecutor's remarks during rebuttal were improper. However, in the absence of a timely objection, such remarks do not warrant reversal of a criminal conviction unless the resulting prejudice could not have been neutralized by a curative instruction. McKenzie, 157 Wn.2d at 52.

Archuleta does not demonstrate that reversal is required pursuant to this standard.

In Thorgerson, the court found misconduct based upon the prosecutor's characterization of the defense arguments as "'bogus,'" "'desperat[e],'" and "'sleight of hand.'" 172 Wn.2d at 450-52. However, as in this case, the defendant did not object at trial to the prosecutor's remarks. Thorgerson, 172 Wn.2d at 442. Because our Supreme Court determined that the improper remarks were not likely to have affected the outcome of the case, and because "a curative instruction would have alleviated any prejudicial effect of this poorly thought out attack on defense counsel's strategy," the court determined that reversal was unwarranted. Thorgerson, 172 Wn.2d at 452.

Similarly, in Warren, our Supreme Court determined that it was improper for the prosecutor to have stated during closing argument that defense counsel's tactics were "'an example of what people go through in a criminal justice system when they deal with defense attorneys,'" and that counsel's argument consisted of "'taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.'" 165 Wn.2d at 29. As in Thorgerson, the defendant did not object to these comments at the time that they were made. Warren, 165 Wn.2d at 30. Accordingly, the court again determined that, because these remarks were not so flagrant and ill-intentioned that they could not have been cured by an

instruction from the trial court, reversal of the defendant's conviction was unwarranted. Warren, 165 Wn.2d at 30.

Here, as in Thorgerson and Warren, the prosecutor's remarks were not so flagrant and ill-intentioned that a curative instruction would not have sufficed to dispel any resulting prejudice. The prosecutor's description of defense counsel's tactics as "smoke and mirrors" was similar to the prosecutor's characterization of defense counsel's argument as "sleight of hand" in Thorgerson, 172 Wn.2d at 450-52. The prosecutor's statement that this is the "job" of a defense attorney was similar (and perhaps less egregious) than the statements at issue in Warren, 165 Wn.2d at 29, where the prosecutor suggested that the role of defense attorneys in the criminal justice system is to twist facts "'to their own benefit.'"[11] Had defense counsel objected, the trial court could have instructed the jury to disregard the prosecutor's remarks and explained the important role of defense counsel within the adversarial system. As in Thorgerson and Warren, such an instruction would have been sufficient to overcome any prejudice resulting from the prosecutor's remarks. Because the

[11] The prosecutor's remarks are also similar to the remarks at issue in Gonzalez, 111 Wn. App. at 283. In that case, the court determined that the prosecutor had impermissibly disparaged defense counsel when she drew a sharp contrast between her own role and that of defense counsel, telling the jury during closing: "'I have a very different job than the defense attorney. I do not have a client, and I do not have a responsibility to convict. I have an oath and an obligation to see that justice is served.'" Gonzalez, 111 Wn. App. at 283. Defense counsel lodged a timely objection that the trial court overruled. Gonzalez, 111 Wn. App. at 283. Although the court determined that reversal was required on other grounds, the court explained in dicta that "[s]uch an argument clearly has the potential to affect a verdict, which would necessitate reversal." Gonzalez, 111 Wn. App. at 284. However, the court also noted that the prejudicial effect of such improper remarks may be corrected by a curative instruction from the trial court. Gonzalez, 111 Wn. App. at 283.

prosecutor's conduct was not so flagrant and ill-intentioned that any resulting prejudice could not have been neutralized by a curative instruction, reversal is unwarranted.[12]

IV

Archuleta next asserts that his right not to twice be placed in jeopardy for the same offense was violated where he was convicted of unlawful possession of a firearm in the second degree, and the jury also returned special verdicts finding that he was armed with a firearm when he committed the crimes of attempted murder in the first degree and assault in the first degree. We disagree.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."[13] The double jeopardy clause bars multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

[12] Archuleta asserts that, even where a defendant lodges no objection to a prosecutor's remarks, reversal is required where the error is not harmless beyond a reasonable doubt. However, this is not the correct standard on appeal. Unless the misconduct alleged involves a prosecutor who "flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence," State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011), our evaluation of the prosecutor's remarks is limited to determining whether the prosecutor's conduct was so flagrantly improper and incurably prejudicial that a remedial instruction to the jury would not have been effective in neutralizing the resulting prejudice. Thorgerson, 172 Wn.2d at 443.

[13] Article I, section 9 of the Washington State Constitution provides that "[n]o person shall . . . be twice put in jeopardy for the same offense." Wash. Const. art I, § 9. The two clauses provide the same protection. In re Pers. Restraint of Borrero, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007).

"[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). As our Supreme Court has explained, "'[i]n order to be the same offense for purposes of double jeopardy[,] the offenses must be the same in law and in fact.'" State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (internal quotation marks omitted) (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). "'If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.'" Calle, 125 Wn.2d at 777 (quoting Vladovic, 99 Wn.2d at 423).[14]

Application of these principles makes clear that the firearm enhancements and the crime of unlawful possession of a firearm are not the same offenses for purposes of the double jeopardy clause. In order to convict Archuleta of unlawful possession of a firearm in the second degree, the jury was required to find that Archuleta had knowingly possessed a firearm and that he was less than 18 years old at the time of that possession. RCW 9.41.040(2)(a)(iii).[15] By contrast, the firearm sentencing enhancements required the jury to determine that Archuleta had committed the substantive crimes with which he was

[14] Double jeopardy claims are questions of law that we review de novo. State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010).

[15] A minor may possess a firearm without violating RCW 9.41.040(2) as provided in RCW 9.41.042. None of the provisions of that statute are applicable here.

charged—attempted murder in the first degree and assault in the first degree—and that he was armed with a firearm during the commission of those offenses. RCW 9.94A.533(3). Being less than 18 years of age at the time of the offense is not an element of the firearm enhancements, and neither committing assault in the first degree nor attempted murder in the first degree is an element of unlawful possession of a firearm. Accordingly, each offense contains an element that the other does not. The firearm possession charge and the firearm enhancements are not the same in law and in fact; thus, the double jeopardy clause does not prevent convictions for both offenses. Calle, 125 Wn.2d at 777.

V

Archuleta last contends that the gang-related aggravating circumstance must be stricken because this aggravating circumstance is not expressly referenced in RCW 9.94A.537(4). Accordingly, Archuleta asserts that the trial court had no authority to submit this aggravating circumstance to the jury. We disagree.

Statutory interpretation is a question of law that we review de novo. State v. Christensen, 153 Wn.2d 186, 194, 102 P.3d 789 (2004). In interpreting a statute, a court's primary obligation is to give effect to the legislature's intent. Christensen, 153 Wn.2d at 194. This inquiry begins with the plain language of the statute. Christensen, 153 Wn.2d at 194. "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an

expression of legislative intent." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

The Sentencing Reform Act of 1981 (SRA) stipulates that a trial court may impose an exceptional sentence outside the standard range only where it finds that there are substantial and compelling reasons to do so. RCW 9.94A.535. The statute sets forth "an exclusive list of factors that can support a sentence above the standard range." RCW 9.94A.535(3). Listed among these factors is the gang-related aggravating circumstance at issue here—an exceptional sentence may be imposed where "[t]he defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang . . . , its reputation, influence, or membership." RCW 9.94A.535(3)(aa). The facts underlying the listed aggravating factors "should be determined by procedures specified in RCW 9.94A.537." RCW 9.94A.535(3). Prior to trial, the state must give notice to the defendant stating the "aggravating circumstances upon which the requested sentence will be based." RCW 9.94A.537(1). The facts supporting the aggravating circumstance must be proved to a jury beyond a reasonable doubt.

RCW 9.94A.537(3). The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. RCW 9.94A.537(3).

Archuleta does not contend that any of these procedures were violated. Instead, he notes that RCW 9.94A.537(4)—which requires that "[e]vidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) . . . be presented to the jury during the trial of the alleged crime"—does not reference RCW 9.94.535(3)(aa), the gang-related aggravating circumstance at issue in his case. Accordingly, Archuleta contends that the trial court "lacked the authority" to permit the jury to consider evidence and return a special verdict on the gang-related aggravator.

Archuleta is correct that "trial courts lack authority during trial to submit special interrogatories to juries in deviation from the SRA's exceptional sentence procedures." State v. Davis, 163 Wn.2d 606, 611, 184 P.3d 639 (2008). However, there was no such violation of these procedures here. Contrary to Archuleta's contention, RCW 9.94A.537(4) does not address a trial court's authority to submit aggravating factors to the jury—instead, this subsection simply differentiates between those aggravating circumstances for which a court *must* present evidence of the aggravator to the jury during trial and those for which a court *may* conduct a separate proceeding:

> Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) *shall* be presented to the jury during the trial of the alleged crime . . . unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating

> circumstances is alleged, the trial court *may* conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

RCW 9.94A.537(4) (emphasis added).

Although the lack of reference to the gang-related aggravator in this subsection leaves it unclear whether evidence supporting this aggravator must be submitted to the jury during trial,[16] this omission does not deprive a trial court of authority to submit this aggravator to the jury. Instead, the source of that authority resides in RCW 9.94A.535(3), which lists the gang-related aggravator within the "exclusive list of factors that can support a sentence above the standard range." As specified in RCW 9.94A.537(3), the facts supporting this circumstance must be proved to a jury beyond a reasonable doubt, regardless of whether such evidence is submitted in the trial of the charged crime or in a separate proceeding. The trial court did not exceed its authority by submitting evidence of the gang-related aggravator to the jury for consideration.[17]

Affirmed.

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[16] Archuleta does not contend that evidence of the gang-related aggravator should have been presented in a separate proceeding.

[17] Archuleta further contends that his right to due process was violated because the "to convict" instruction on the charge of attempted murder in the first degree did not include premeditation as an element of that crime. Archuleta is incorrect. State v. Besabe, 166 Wn. App. 872, 883-84, 271 P.3d 387 (2012).

Dwyer, J.

We concur:

Cox, J.

Grosse, J.